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October 11, 2000

Via HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals – TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

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OCT 11 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: In the Matter of Implementation of Video Description of Video
Programming, MM Docket No. 99-339**


Dear Ms. Salas:

On behalf of EchoStar Satellite Corporation ("EchoStar"), enclosed please find for filing an original and eleven copies of the EchoStar's Petition for Reconsideration in the above-referenced matter.

Also enclosed in an additional copy of EchoStar's Petition which we ask you to date-stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Rhonda M. Rivens
Counsel for EchoStar Satellite Corporation

Enclosures

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of

Implementation of Video Description of
Video Programming

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MM Docket No. 99-339

ECHOSTAR SATELLITE CORPORATION'S PETITION FOR RECONSIDERATION

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SUMMARY

The Commission's goal of addressing the needs of visually impaired consumers is unquestionably laudable, but it is an example of a salutary end pursued by disproportionate and ultimately ineffectual means. First, the Commission lacks statutory authority to mandate video description requirements. The proposed legislation ultimately leading to the 1996 Telecommunications Act had indeed initially given the Commission the authority to promulgate video description rules. Congress, however, pointedly dropped that language from the final law and replaced it with a requirement that the Commission submit to it a report on video description instead, even as it empowered the Commission to make rules in the closed-captioning area. The case law on statutory construction is clear on what that sequence of events means: Congress did not want to authorize the Commission to make video description rules. Where, as here, the Congressional intent that the Commission is to pass no rules is so unmistakable, the Commission may not permissibly circumvent it by invoking (as happened here) its general rulemaking authority.

Indeed, the Commission's lack of authority here is further punctuated by even a cursory look at the much more heavily regulated common carrier area. There, the 1996 Telecommunications Act did empower the Commission to require providers to ensure access to persons with disabilities, but Congress was careful to qualify the access obligation by the "readily achievable" standard. Here, in the much more lightly regulated area of DBS, the Commission not only went ahead and imposed access obligations, but failed to properly apply any type of "reasonably achievable" standard to mitigate the burden associated with the obligation. The reason for this is of course clear – Congress did not articulate such a qualification because there was no access obligation to qualify. The Commission's unauthorized

initiative was necessarily unguided by any statutory standards. All the same, that initiative has had the perverse result that DBS providers are now regulated more heavily in the area than common carriers, even though it is only these latter entities that are subject to an explicit statutory obligation with respect to access by persons with disabilities.

In fact, the Report and Order's almost flippant disregard for the burdens imposed by the video description requirement for satellite carriers such as EchoStar constitutes one more ground for reconsidering the rules – the Commission plainly did not engage in reasoned decisionmaking and disregarded the facts. For EchoStar just to retransmit the video description embedded by programmers would occupy scarce and expensive bandwidth that EchoStar simply cannot afford to devote to video description, especially in light of the onerous must-carry requirement and the fact that spectrum used to retransmit a local broadcast signal is already wasted as it is for a much larger swath of the country. This burden is further exacerbated by making the distributor the responsible party of last resort for compliance with the rules. That requirement is unreasonable in itself, considering that video description is an exponentially more difficult project than closed-captioning – especially so for an entity that is not in the business of producing programming. The Commission ignored these burdens and resorted to the open-ended and flawed justification that an expenditure of tens of millions of dollars is not burdensome if it is only a fraction of a DBS operator's revenue. This analysis completely disregards the DBS operators' costs – which in fact exceed their revenue, and sets the bar so high that only a complete confiscation of most of a company's revenue would be regarded as burdensome.

Nor did the Commission properly evaluate the benefits that can reasonably be expected to result from the rules for the intended beneficiaries, persons with visual disabilities, let alone balance the costs against these benefits. Video description is a world different than

closed-captioning, not only in the difficulty associated with creating it but also with respect to how much of the appreciation of the programming content it can realistically preserve. Whereas the translation of the spoken word to text may preserve much of what that word was designed to convey, it is questionable at best whether the audio description of an unfolding visual scene could help the intended beneficiaries in the same manner. For such reasons, one of the two main associations of persons with visual disabilities actually wrote comments opposing video description. Despite that opposition, the Commission still failed to appreciate that the benefits promised by the rules were tenuous at best, and were certainly outweighed by the considerable burdens they impose. For these reasons, EchoStar respectfully requests that the Commission reconsider its authority to promulgate these rules or at least reconsider the substance of the rules.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
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Implementation of Video Description of)	MM Docket No. 99-339
Video Programming)	
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ECHOSTAR SATELLITE CORPORATION’S PETITION FOR RECONSIDERATION

Pursuant to Rule 1.429 of the Commission’s rules,¹ EchoStar Satellite Corporation (“EchoStar”) hereby petitions the Commission for reconsideration of the Commission’s Final Rule mandating that multichannel video programming distributors including Direct Broadcast Satellite (“DBS”) operators provide programming with video description. The Commission’s goal of addressing the needs of visually impaired consumers is unquestionably laudable, but it is an example of a salutary end pursued by disproportionate and ultimately ineffectual means. Not only does the Commission lack statutory authority to mandate video description requirements, its almost flippant disregard for the burdens imposed by the video description requirement for satellite carriers such as EchoStar, and its failure to realistically assess the potential benefits constitute one more ground for reconsidering the rules – the Commission plainly did not engage in reasoned decisionmaking and disregarded the facts. For these reasons, EchoStar respectfully requests that the Commission reconsider its authority to promulgate these rules or at least reconsider the substance of the rules.

¹ 47 C.F.R. § 1.429.

I. THE COMMISSION LACKS STATUTORY AUTHORITY TO MANDATE VIDEO DESCRIPTION REQUIREMENTS AND CANNOT CONFER UPON ITSELF THE POWER TO DO SO

A. The Commission Has No Authority to Mandate Video Description Rules

The proposed legislation ultimately leading to the 1996 Telecommunications Act initially gave the Commission the authority to promulgate video description rules.² Yet, as the Commission recognizes, a Congressional Conference Committee dropped that language from the final law and replaced it with a requirement that the Commission submit to it a report on video description instead.³ The case law on statutory construction is clear on what that sequence of events means: Congress did not want to authorize the Commission to make video description rules. As the Supreme Court stated in *Gulf Oil Corp. v. Copp Paving Co.*, the deletion of a provision by a conference committee “militates against a judgment that Congress intended a result that it expressly declined to enact.”⁴ Remarkably, the Commission interprets Congress’ deletion of authority to promulgate video description rules to mean that Congress intended to

² The House of Representatives approved version of the legislation contained language stating: “Following the completion of such an inquiry [regarding video description], the Commission may adopt regulation it deems necessary to promote the accessibility of video programming to persons with visual impairments.” H.R. 1555, § 204(f); H.R. Rep. No. 104-204, Part I at 140. See also H.R. Conf. Rep. No. 104-458 at 184 (1996).

³ *In the Matter of Implementation of Video Description of Video Programming*, Report and Order, MM Docket No. 99-339 (rel. Aug. 7, 2000) at ¶ 58 (hereinafter, “*Video Description Order*”) (citing H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 183 (1996)).

⁴ 419 U.S. 186, 199-200 (1974). See also *Goncalves v. Reno*, 144 F3d. 110, 132 (1st Cir. 1988) (“[a] contrast in statutory language [between legislation as passed by either the House or Senate and the final version approved by Congress] is ‘particularly telling’ when it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee’s choice is then approved by both Houses of Congress.”) (citation omitted).

grant the Commission “discretion” to implement rules.⁵ This interpretation may have made sense if the deleted language had stated that the Commission was *required* to make rules. In that case, the Commission could have conceivably read the provision to still leave the Commission *discretion* in that regard. What was deleted was the grant of *authority*, however. Congress initially said that the Commission *may* promulgate rules, and then elected to delete that grant of authority.⁶ A deletion of an authorization cannot rationally be parlayed into its opposite – a grant of authority or discretion. There is no difference here between authority and discretion, and when the Commission’s authority was deleted, its discretion went with it. Where, as here, the Congressional intent that the Commission is to pass no rules is so unmistakable, the Commission may not permissibly circumvent it by invoking (as happened here) its general rulemaking authority.⁷

Had Congress intended for the Commission to impose video description obligations, Congress could certainly have done so. In the same section of the Communications Act that directs the Commission to inquire and report on video description, Congress instructed

⁵ *Video Description Order* at ¶ 60.

⁶ The language deleted by the Conference Committee stated “. . . the Commission *may* adopt regulation it deems necessary to promote the accessibility of video programming to persons with visual impairments.” H.R. 1555, § 204(f); H.R. Rep. No. 104-204, Part I at 140 (emphasis added).

⁷ The Commission relies on *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) for the proposition that it has broad discretion to act so long as it acts to further the legislative purposes for which it was created. The Commission’s reliance on *Rural Telephone* is misplaced, however, because that case, unlike here, involved Commission regulation with respect to matters about which Congress was silent. Here, in contrast, Congress has expressed its intent regarding video description – the Commission is to provide a report to Congress – and nothing more.

the Commission to not only inquire and report,⁸ but to *implement* rules for closed captioning, stating “within 18 months after February 8, 1996, the Commission shall prescribe such regulations as are necessary to *implement* this [closed captioning] section.”⁹

Rightly recognizing this gap in its authority, the Commission was compelled to address the difference between the authority Congress delegated to it with respect to closed captioning and that delegated with respect to video description. The Commission simply concluded that “the difference in treatment between closed captioning and video description simply means that Congress intended the Commission not to have any discretion on whether to adopt closed captioning rules, but left it to the Commission to decide whether to adopt video description rules.”¹⁰

In reaching this conclusion, the Commission again ignored elementary principles of statutory construction, for it is well established that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”¹¹ As Congress intentionally mandated implementation of closed captioning rules

⁸ 47 U.S.C. § 613(a).

⁹ 47 U.S.C. § 613(b) (emphasis added).

¹⁰ *In the Matter of Implementation of Video Description of Video Programming*, Report and Order, MM Docket No. 99-339 (rel. Aug. 7, 2000) at ¶ 60 (hereinafter, “*Video Description Order*”).

¹¹ *Nat’l Rifle Ass’n v. Reno*, 216 F.3d 122, 130 (D.C. Cir. 2000) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); see also *West Coast Truck Lines, Inc. v. Arcata Community Recycling Ctr., Inc.*, 846 F.2d 1239, 1244 (9th Cir. 1988) (“when some statutory provisions expressly mention a requirement, the omission of that requirement from other statutory provisions implies that Congress intended both the inclusion of the requirement and the exclusion of the requirement.”)

and intentionally omitted any mention of mandating rules for video description, Congress obviously did not intend for the Commission to promulgate video description rules. Rather, the Commission's duties with respect to Section 713(f) were limited to inquiring and reporting to Congress; the Commission lacks authority to do anything more.

B. The Commission Cannot Confer Upon Itself the Power to Mandate Video Description Requirements

The Commission's apparent fall-back position is that even if it lacks authority under Section 713 of the Act, it has authority to adopt video description rules under the "general" rulemaking authority accorded to it by Congress in Section 4(i) and Section 303(r) of the Act.¹² Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."¹³ Section 303(r) similarly states that the Commission may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...."¹⁴

Notably, both of the general rulemaking statutes require that the Commission not act in a manner "inconsistent with [the Communications] Act" or "inconsistent with law." The general rulemaking statutes cannot, therefore, save the Commission's video description rule – by promulgating video description rules despite the explicit refusal of Congress to mandate such rules, the Commission has acted in a manner inconsistent with the Act.

¹² *Video Description Order* at ¶ 54.

¹³ 47 U.S.C. § 154(i).

¹⁴ 47 U.S.C. § 303(r).

Moreover, as courts have long recognized, when a federal agency lacks authority to do something, the “agency may not confer power upon itself.”¹⁵ In *Gorbach v. Reno*,¹⁶ the Attorney General issued regulations for revocation of citizens’ naturalization. Although the immigration statutes only expressly authorized the Attorney General to naturalize persons, the denaturalization regulations purported to be based on the Attorney General’s “general authority to administer the immigration laws.”¹⁷ The Attorney General in *Gorbach* made an argument similar to the rationale employed here by the Commission – as Commissioner Powell describes the Commission’s rationale in his dissent, “*Congress may not have directed the FCC to draft rules, but it did not tell them they could not either.*”¹⁸ In both instances, the agencies are wrong because the statutes, taken as a whole, reflect Congressional intent that the agencies not have the authority to act.

Specifically, the court in *Gorbach* struck down the Attorney General’s denaturalization regulations, explaining that because Congress expressly addressed the denaturalization process in the immigration statute without delegating any such authority to the Attorney General, the Attorney General could not assume that it could still act under its general authority. The court observed that, reading the relevant statutory provisions in context, “the

¹⁵ *International Ass’n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1068 (9th Cir. 1998) (quoting *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374-75 (1986)), *rev’d on other grounds sub nom. United States v. Locke*, 120 S.Ct. 1135 (2000).

¹⁶ 219 F.3d 1087 (9th Cir. 2000).

¹⁷ *Id.* at 1089.

¹⁸ *Video Description Order, Separate Statement of Commissioner Michael K. Powell Dissenting in Part and Concurring in Part*, at 1 (emphasis added).

statute is unambiguous in *not* conferring upon the Attorney General the power to denaturalize citizens administratively.”¹⁹ Likewise, here Congress explicitly addressed the matter of video description without giving the Commission the power to make video description rules. The statute is unambiguous in not conferring authority upon the Commission to make video description rules. Rather, the Commission only has authority to inquire and report to Congress, with Congress reserving to itself the power to act or not act on the matter.

C. The Video Description Rules Are Inconsistent With Congressional Intent Regarding Accessibility in the Communications Act

The Commission’s lack of authority here is further punctuated by even a cursory look at the much more heavily regulated common carrier area. There, the 1996 Telecommunications Act did empower the Commission to require providers to ensure access to persons with disabilities, but Congress was careful to qualify the access obligation by the “readily achievable” standard.²⁰ Here, in the much more lightly regulated area of DBS, the Commission not only went ahead and imposed access obligations, but failed to properly apply any type of “reasonably achievable” standard to mitigate the burden associated with the obligation.²¹ The reason for this is of course clear – Congress did not articulate such a

¹⁹ *Id.* at 1093 (emphasis in original).

²⁰ *See* 47 U.S.C. § 255 (b), (c).

²¹ Although the Commission noted a “general legislative preference” of Congress for increased accessibility of certain communications services for persons with disabilities and cited Section 255 of the Communications Act, *In the Matter of Implementation of Video Description of Video Programming*, Notice of Proposed Rulemaking, MM Docket No. 99-339 (rel. Nov. 18, 1999) at ¶ 36, the Commission did not purport to rely on Section 255 as authority for the final rule. Nor could the Commission have relied on that section, which applies only to providers of “telecommunications service” (and manufacturers).

qualification because there was no access obligation to qualify. All the same, the Commission's unauthorized initiative, unguided as it necessarily was by any statutory standard, has had the perverse result that DBS providers are regulated more heavily in the area than common carriers, even though it is only these latter entities that are subject to an explicit statutory obligation with respect to access by persons with disabilities.

II. THE VIDEO DESCRIPTION RULES ARE THE PRODUCT OF UNREASONED DECISIONMAKING

Notwithstanding the Commission's lack of authority to promulgate video description rules, the rules themselves are the product of unreasoned decisionmaking, as the Commission did not adequately assess either the burdens or the benefits of the rule.

The Report and Order's almost flippant disregard for the burdens imposed by the video description requirement for satellite carriers such as EchoStar by itself constitutes a ground for reconsidering the rules – the Commission plainly did not engage in reasoned decisionmaking and disregarded the facts. Just to retransmit the video description embedded by programmers would occupy scarce and expensive bandwidth that EchoStar simply cannot afford to devote to video description, especially in light of the onerous must-carry requirement and the fact that spectrum used to retransmit a local broadcast signal is already wasted as it is for a much larger swath of the country.

Specifically, in light of the toll on bandwidth that Secondary Audio Program ("SAP") feeds entail, EchoStar currently has not agreed to support such feeds except for a minority of the local broadcast signals that it carries (where EchoStar has agreed to support Spanish language SAP feeds). Even in these cases, EchoStar does not currently carry SAP feed

for any broadcaster, and may soon commence doing so only in a handful of markets. Similarly, EchoStar does not transmit SAP feeds except for very few cable networks (including only two basic cable networks).

A requirement of supporting SAP feeds for all the hundreds of broadcast stations retransmitted by EchoStar would constitute a significant additional expenditure of bandwidth and could affect EchoStar's ability to expand local network offerings to additional parts of the country. EchoStar estimates that video description would require approximately 6.25% of a channel of incremental bandwidth (adding up to a significant loss of bandwidth for hundreds of channels). In other words, the new video description requirement could potentially translate into a bandwidth loss that is comparable to, or even greater than, the 4% set-aside for public interest programming, which has been explicitly authorized by statute. This comparison alone illustrates that the Commission should not lightly impose such a burden, especially without any legislative directive.

The video description requirement could also entail costly adjustments to EchoStar's uplink operations. For example, if the broadcaster or cable programmer had three audio feeds (English, Spanish and video description), EchoStar would need new decoders that could separate out three audio feeds. If the programmer also transmits Dolby Digital Sound, EchoStar would need decoders that separate out four audio feeds. EchoStar could also need to make some adjustment to channel positions on the transponders of its satellites to fit this incremental bandwidth into its service. Finally, for broadcast channels, the video description requirement would necessitate the installation of a separate demodulator for each channel in the local receiver facility or replacement of the existing demodulator, at additional cost.

These burdens are further exacerbated by making the distributor the responsible party of last resort for compliance with the rules – a requirement that is unreasonable in itself, considering that video description is an exponentially more difficult project than closed-captioning – especially so for an entity that is not in the business of producing programming.

In fact, the Report and Order appears to acknowledge that the video description rules may cost tens of millions of dollars to a DBS operator, but dismisses cavalierly this burden based on a facile cost-benefit analysis ostensibly designed to demonstrate that no matter how costly the rules, DBS operators could afford to implement them.²² The “analysis” was a “quick and dirty” calculation of DBS subscriber revenues, derived by multiplying the number of subscribers by the average price DBS operators charge subscribers per month.²³ The Report and Order then compares the “hundreds of millions” of dollars in monthly subscriber revenues to the “tens of millions of dollars” it would cost DBS operators to comply with the rule, and essentially concluded that, whatever the cost, DBS operators could afford it.²⁴ Such a methodology for belittling the burdens from the rule is as open-ended as it is flawed. Many companies that make hundreds of millions of dollars in revenue make millions, or tens of millions, in profit. Under the Commission’s methodology, a rule costing such a company an amount that could be many times its profits would not be burdensome because it is only a fraction of its total gross revenue. Here, of course, the analysis is even less defensible, since neither of the two primary DBS companies

²² The Commission did not disagree with DIRECTV’s assertion that “it would cost tens of millions of dollars” to comply with the video description rules. *See Video Description Order* at ¶ 28.

²³ *Id.*

²⁴ *See id.*

in the United States is currently profitable. DBS operators' costs exceed their revenues, making an additional expenditure of tens of millions of dollars that much more burdensome. It is not rational decisionmaking to set the bar so high as to dismiss any burden that falls short of exacting a majority of a company's revenue.

Nor did the Commission properly evaluate the benefits from the requirements for its intended beneficiaries, persons with visual disabilities, let alone balance the costs against these benefits. Video description is a world different than closed-captioning, not only in the difficulty of incorporating it into the system but also in the difficulty of creating and accurately conveying the visual content in an audio format. Whereas the translation of the spoken word to text may preserve much of what that word was designed to convey, it is questionable at best whether the audio description of an unfolding visual scene could help the intended beneficiaries in the same manner. For such reasons, one of the two main associations of persons with visual disabilities actually wrote comments opposing video description.²⁵ Nevertheless, the Commission still failed to appreciate that the benefits promised by the rules were tenuous at best, and were certainly outweighed by the considerable burdens they impose.

There is no doubt that it is a noble goal for disabled persons to have access to multi-channel programming.. Realistically, however, as Congress acknowledged by creating the "readily achievable" standard in Section 255 of the Communications Act, access cannot be mandated without regard to its cost, and that great cost to produce little or no benefit is not an acceptable combination. In light of the tremendous burden presented by the video description

²⁵ *Video Description Order* at 3, n. 11 (noting that the National Federation for the Blind and a number of its members do not support the video description rule).

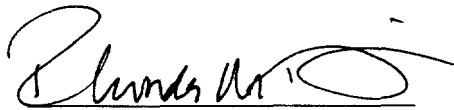
rules, and most notably, in light of the fact that some of the beneficiaries of the rule admittedly oppose the rule, the Commission cannot justify video description rules based on the meager analysis performed here.²⁶

IV. CONCLUSION

The Commission's goal of addressing the needs of visually impaired consumers is unquestionably laudable, but this is an example of a good end pursued by disproportionate and ultimately ineffectual means. For these reasons, EchoStar respectfully requests that the Commission reconsider its authority to promulgate these rules or at least the substance of the rules.

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²⁶ EchoStar also believes that, at least in these circumstances, the video description requirement raises serious constitutional problems under the First Amendment, as was argued by some parties in the proceeding.